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No. 351

Supreme Court of the United States

OCTOBER TERM, 1947.

CONSOLIDATED MACHINE TOOL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Consolidated Machine Tool Corporation, a corporation duly organized and existing under and by virtue of the Laws of the State of Delaware, with its office and principal place of business in the City of Rochester, respectfully prays that a writ of certiorari issue herein to review a certain final decision of the United States Circuit Court of Appeals, for the Second Circuit, the opinion and decision of said Court having been rendered on July 25, 1947 and the decree having been entered thereon on August 15, 1947.

OPINIONS BELOW

The decision and order of the National Labor Relations Board in this matter is dated April 25, 1946, and is printed in the appendix to respondent's (petitioner's below) brief in the Circuit Court of Appeals at pages "1" to "8", and this

decision and order contains as an appendix thereto the intermediate report of the trial examiner, which is printed pages "10" to "42" in the same appendix. This decision is reported 67 N. L. R. B. 737 (3-C-783).

The opinion in the United States Circuit Court of Appeals, for the Second Circuit, was written by Judge Swan. It has not yet been reported and for the sake of convenience it is printed as an appendix to this petition and brief and marked Appendix A.

The order in the Circuit Court of Appeals entered August 15, 1947 is printed herein and attached hereto as Appendix B.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code, Section 347(a), Title 28, U. S. C. A.

On stipulation entered into between petitioner and respondent an Order was made and entered in the United States Circuit Court of Appeals, for the Second Circuit, on August 15, 1947, staying all proceedings for the enforcement of the decree of that court for thirty days after the entry thereof and thereafter until the hearing and determination of this petition, if the same be perfected within said thirty day period, and if the petition be granted by this court, until the final determination of the matter herein.

QUESTIONS PRESENTED

(1) Has the petitioner been deprived of its constitutional rights by reason of the fact that National Labor Relations Board and the Circuit Court of Appeals have compelled this employer to recognize a labor organization as the bargaining agent of its employees which has never been appointed by a

majority of the employees and which has been repudiated by seven of the ten employees in the designated unit as shown by all the evidence, which evidence has been entirely ignored by the National Labor Relations Board and the Circuit Court of Appeals?

(2) Has the National Labor Relations Board ever had jurisdiction to compel an employer to recognize a union when seven out of the ten employees in the designated unit testified that they did not want to be represented by the union and which testimony is uncontradicted?

(3) Has the Circuit Court of Appeals erred in its decision in entirely overlooking and ignoring the provisions of "Labor Management Relations Act, 1947"?

REASONS FOR ALLOWANCE OF WRIT

The petitioner has been required by the decree sought to be reviewed to recognize a union, which does not represent its employees and which is not wanted by these employees as their representative. In ordering and decreeing the union as such representative, the Board and the Court below not only entirely ignored but decided against the only testimony in the case as to the attitude of the employees to the effect that they did not want the union as a bargaining agent.

In January, 1945, the Pattern Makers League of North America (hereinafter referred to as the "league") obtained signatures on cards of nine out of the ten pattern makers employed by the petitioner. These cards were "proposal cards" and were conditioned upon the happening of certain events which never occurred. Whatever may have been their effect, they were repudiated by all the pattern makers of their own uninfluenced volition according to all the uncontradicted testimony. It is on the effect of these cards that the decision

below is based regardless of the uncontradicted testimony of all the witnesses that they did not want and never did want the league as their bargaining representative.

The petitioner also contends that the enforcement of the decree below would wholly contravene and violate the spirit and the letter of the Labor Management Relations Act, 1947 because it has been ordered that this league be recognized as a bargaining representative although it has not in any respect qualified to act as such under the requirements of the new act. Whatever basis there possibly could be found in this record for its right to represent those employees was terminated by the provisions of the new act. Although the case was tried long before the enactment of the 1947 Act, that Act was before the Circuit Court of Appeals and although not then in force, would be in force when the court's decree would apply. At the time of this petition, the Act is in full force and effect and that under the authorities of this Court, the provisions of this Act should be made applicable to the facts of this case.

A mere statement of this situation demonstrates that this question is of general interest and, therefore, should be reviewed by this Court.

The petitioner's brief on the questions presented is attached hereto and made a part hereof.

WHEREFORE, petitioner prays that a writ of certiorari be granted and directed to the United States Circuit Court of Appeals, for the Second Circuit, and that the judgment and decree of that Court be reviewed.

Respectfully submitted,

PERCIVAL D. OVIATT,
Counselor for Petitioner.

Of counsel:

GEORGE J. SKIVINGTON
ROBERT W. CLARKE

Supreme Court of the United States

OCTOBER TERM, 1947.

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BRIEF

Reference Marks:

Numbers alone in parentheses mean pages of Respondent's (Petitioner below) Appendix.

Opinions in Courts Below:

N. L. R. B. v. Consolidated Machine Tool Corp., 67 N. L. R. B. 737.

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A

Statement of the Case

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A. Statement of the Case.

The following are, we believe, the facts to which the law is to be applied:

1.—The Petitioner.

The Petitioner is a Delaware corporation engaged in the manufacture and sale of machine tools and related products,

with its plant at Rochester, New York. It has many hundreds of employees, among whom only ten were engaged in making patterns.

2. The Pattern Makers League of North America, A. F. of L.

In January, 1945, the League was attempting to organize the pattern makers of the petitioner. In addition, the International Association of Machinists (not involved here) had filed a certification of representatives at the same time, asking that all the employees of the petitioner be included in its unit (16). At a meeting on January 16, 1945, between the petitioner, the Machinists and the League, it was agreed that the pattern makers were not to be included in the unit to be represented by the Machinists.

3. The January Proposal Cards.

In January 1945, the Pattern Makers Union had caused to be signed by nine (9) out of ten (10) pattern makers certain so-called "proposal cards" which were given to R. D. Lichtenwalter, the District Organizer of the Pattern Makers (55, 210, 216, 217). The delivery of these cards was conditional. Habrecht, a pattern maker, testified without contradiction that the cards were not to become effective unless 80% or 90% of the pattern makers in the City of Rochester had signed (242, 246). There is no proof that this condition was satisfied. Williams, a pattern maker, testified that he signed because he was given to understand that the cards were signed in order that the pattern makers could keep out of the Machinists Union; that he never intended to apply for membership in the League; that he signed because this was the only way he could keep from being voted into the Machinists Union (254, 255). Dirkx and Getzin testified that their understanding was the same as that of Williams (267, 275). Getzin testified that he never wanted to join the League and did not want to at the

time of the hearing (275, 276). The following pattern makers testified that they never intended to apply for membership in the Pattern Makers League: Williams (253, 254, 255), Getzin (275, 276), and Habrecht (241, 242, 245).

4. The March Meeting and Application Cards.

On March 27, 1945 there was a meeting of some of the pattern makers who had signed the January cards. This meeting was called by Mr. Lichtenwalter, the organizer (60, 266). At this meeting, certain amounts were paid by some of the pattern makers to apply upon possible future initiation fees. In no instance was there paid the total amount of initiation fees required by the League in order to qualify for membership. Lichtenwalter determined that an initiation of the pattern makers into the League was to occur on March 29, 1945 (73). At the March meeting, Embrey, a pattern maker, having nothing to do with Union matters, made certain false statements to the effect that the Respondent had refused to give him a release and had ill-treated him (76, 77, 143, 163, 181). In a heated statement, Embrey had indicated that he was very bitter toward the Respondent (77, 144). The pattern makers were indignant (246). Embrey had voluntarily quit his employment before March 27, 1945. A day or two following March 27, 1945, a group of pattern makers gave Embrey a party in relation to his going away, and at that party Embrey stated that the Respondent had treated him very fine, and he made complimentary statements about the Respondent. Embrey wanted Ingle, the president of the Company, and Hohnhurst, the Personnel Manager, to be invited to the party (147). These March application cards (Exhibit 4) (317, 320) were manifestly cards which were not to be effective until acted upon by the League. They provided that a tool benefit fee must be forwarded with the application. This was never done. On the back of the cards there appeared matter

to indicate prospective action by the League. The cards contained a space indicating who had recommended the applicants, and a space indicating that the Executive Committee had examined the application and recommended admission. After these spaces there appeared lines for signatures by the Chairman of the Executive Committee, five lines for the signatures of the members of the Executive Committee, and a line for the signature of the Secretary. None of these spaces were filled out and none of these signatures appeared on the cards. Below these matters there appeared a certificate to the effect that the application had been acted upon, and that the candidate had become a member of the League. Before the body of this certificate there appeared lines for the signature of the President and the Secretary. Neither of these signatures appeared upon any of the cards.

5. The Voluntary Repudiation of the Cards.

In letters addressed to the League and to the National Labor Relations Board, the men stated that they withdrew their applications to the League. These applications were never effective, and they did not authorize representation. It was a proper thing for them to withdraw any possible designation because of the contention of the League that the applications did constitute a designation. The first of these two letters (never delivered) dated July 30, 1945 (Exhibit 12; 331) simply stated that the men withdrew their applications and did not want to become members of the League and did not want the League to represent them. The second letter was dated Septembr 5, 1945, and contained the same statements as the letter of July 30, 1945 (Exhibit 9; 328).

6. The Attitude of the Employees Toward the League.

On September 6 and 7, 1945, pursuant to notice, a hearing was held in Rochester, New York, before a trial examiner of

the National Labor Relations Board. At this hearing, eight of the ten pattern makers of the petitioner were called as witnesses. Of this number, seven testified that they did not want to join the League nor did they want it as their bargaining agent. In addition, they stated that this decision was made of their own free will and without coercion or any outside influence. Elston (166), Wehner (182), Robinson (187), Williams (194, 252, 253), Habrecht (242), Dirkx (266, 267, 268), Getzin (275, 276, 277). Every one of the pattern makers stated that he did not want the Union (195, 185, 241, 154).

At the hearing, all witnesses were excluded until called to testify. None were influenced by the prior testimony of the others. This testimony represents the latest indication by the pattern makers that the majority of them did not wish to be represented by the League.

B. The Argument.

POINT I

Failure to consider evidence.

The United States Circuit Court of Appeals for the Second Circuit has ordered the petitioner to bargain with an agent which does not represent the majority of the employees in the designated unit. At the hearing held by the Board on September 6, 1945, the pattern makers all testified that they did not want the League as their bargaining agent. It is of no consequence whether this attitude existed in January, 1945. No matter what the men might have indicated by prior acts or statements, each pattern maker called indicated of his own free will and without coercion or outside influence that he did not want the League as his bargaining agent.

Elston (166), Wehner (182), Robinson (187), Williams (194, 252, 253), Habrecht (242), Dirkx (266, 267, 268), Getzin (275, 276, 277).

This petition is not for a reconsideration of issues determined by the United States Circuit Court of Appeals for the Second Circuit. It is for a consideration of issues which are controlling, but which have been overlooked. No part of the decision of the Circuit Court shows any consideration of the testimony, which represented the most recent opinion of the pattern makers. It has been entirely ignored. By ignoring this evidence, the Circuit Court, more than two and one-half years after the date the Board claims the League was the agent of the pattern makers, is forcing the pattern makers to be represented by a bargaining agent, contrary to their desires.

The pattern makers were free to repudiate their selection prior to their acceptance into membership by the League. As was stated in *Joe Hearin Lumber*, 66 N. L. R. B. 150, 3/28/46:

> "where there is clear and cogent evidence that a majority of the employees within the unit no longer desired representation by a union whose representative status had been determined by a card check, and a complete absence of evidence that the respondent interfered with the employees' statutory rights, we are of the opinion that the respondent was justified in questioning the Union's majority status and in good faith refusing to continue negotiations for this reason. Accordingly, we find that the respondent has not refused to bargain with the Union within the meaning of Section 8 (5) of the Act."

Also in the *Matter of Wilmington Trans. Co.*, 4 N. L. R. B. 750, the Trial Examiner heard oral testimony as of the date of the hearing which was considered adequate proof of a majority to determine the representative of the employees in-

volved for purposes of collective bargaining. If oral testimony can be heard to establish a majority, so may it be heard here to show a majority never existed or, that if it did, to show the employees voluntarily changed their minds and no longer wanted to be represented by the League.

The decree of the Circuit Court that the Company shall bargain with the League utterly repudiates all the undisputed testimony.

In *Matter of Richfield Oil Corporation*, 7 N. L. R. B. 639, testimony concerning a revocation of the Union as a collective bargaining agency would have been admissible and effective at the hearing, as the Board stated:

> "No *evidence* was adduced at the hearing tending to show that any of the employees whose names appeared on the application cards had joined another labor organization or *had revoked* their designation of the Union as collective bargaining agency."

Also, in *Matter of Gemmer Mfg.*, 12 N. L. R. B. 584, the Board stated:

> "No *evidence* was introduced to prove that any employee *had revoked* his designation. The persons who obtained the signatures to the cards were cross-examined by the Company's attorney as to the circumstances under which the signatures were secured. *In the absence of proof to the contrary*, we are of the opinion that the employees who signed the designations continued to desire the union to represent them."

Also, in accordance with principles set forth in *Donnelly Garment Co. vs. N. L. R. B.*, 151 F 2d, 854, 872, the testimony of the pattern makers at the hearing should have been considered before the Board issued an order designating the League as the exclusive bargaining agent of the pattern makers. Such failure to consider competent and material evi-

dence by the Circuit Court is want of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

> "It is our understanding that, when an employer is charged with an unfair labor practice which he denies having committed, the Constitution of the United States guarantees him a fair trial of the issue; that one of the requirements of a fair trial is that any evidence which is competent and material shall be received and considered, and that the strength of the testimony against him has no bearing upon the admissibility of his testimony or his right fully to present his defense."

The opinion of the Supreme Court in this case —— U. S. —— 91 L ed 673 does not effect our argument as to the right to have such evidence considered. It merely held that the testimony which had been admitted had been considered.

Even in the case of a majority, which has been lost, the power of the Board to maintain a status quo must depend either upon direct testimony to the effect that unfair labor practices dictated the attitude of the men, or upon a presumption—a presumption which can be rebutted. In the case at Bar, there is no evidence to sustain such a presumption, and all the evidence is against it.

In *N. L. R. B. v. Inter City Advertising Co., Inc.*, 154 F 2d 244, 248, it was held that when a Union majority was dissipated without fault on the part of the employer, the Union no longer is the bargaining agent, and the Board has no right to require the employer to bargain with it.

In *Colorado Fuel & Iron Corporation v. N. L. R. B.*, 121 F 2d 165, the court said that "it may be presumed that that authority continued, absent a contrary showing that they voluntarily rescinded it."

In *Int'l Association of Bridge Structural & Ornamental Iron Workers, et al. v. Pauly Jail Bldg. Co., et al.*, 118 F 2d

615, the Court said, with reference to the continuance of an original majority: "presumptively at least, its status as collective bargaining agent continued."

In *N. L. R. B. v. P. Loriliard Co.*, 117 F 2d 921, the court said that where a determination had once shown that the union is the choice of a majority

> "a *presumption* arises that this organization continues to represent the unit, but that *presumption may be rebutted by lapse of time* * * * or by a change in the conditions which demonstrate that a shift in the sentiment actually exists among the employees and is caused by *other factors than the employer's* refusal to bargain collectively."
>
> * * *
>
> "In the instant case, both the lapse of time and the change in the conditions demonstrate that the union may no longer represent a majority."

In *Int'l Assn. of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B.*, 110 F 2d 29, the court accentuated the fact that the right of the Board to recognize an earlier majority, later destroyed, was a mere presumption.

There is no evidence that the Pattern Makers League ever represented a majority. The signing of the application cards on or about January 16, 1945 did not constitute the League as the bargaining agent of the employees.

The general rule as set forth in *N. L. R. B. v. Somerset Shoe Co.*, 111 F 2d 681, states:

> "in the absence of evidence to the contrary an application for membership in a labor organization may be considered as a designation of the labor organization as the applicant's representative for the purposes of collective bargaining."

Seven pattern makers out of ten testified at the hearing of their own free will that they no longer desired to be members of the League. Such testimony should have been given its proper effect as consisting of that "evidence to the contrary" referred to under the rule of the Somerset Shoe Co. case supra.

Bargaining with such an agent which did not nor does not represent a majority of the designated unit would have constituted an unfair labor practice contrary to section 9 (a) of the National Labor Relations Act. In addition, cases hold that there is an implied duty not to bargain with any except representatives of the majority. See *Donnelly Garment Co. vs. International L. G. W. Union*, 99 F 2d, 309, 316.

POINT II

Application of the Labor Management Relations Act, 1947.

The great weight of authority in the State and Federal Courts of this country holds that an Appellate Court should dispose of a question according to the law prevailing at the time of the final disposition of the question. To hold otherwise would be to deny the obligation of the new law. See *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49; *Yeaton v. United States*, 5 Cranch 281, 3 L. Ed. 101; *The Rachael*, 6 Cranch 329, 3 L. Ed. 239; *Berry v. Davis*, 242 U. S. 468, 61 L. Ed. 441.

In Board of *Public Utility Commissioners vs. Compania General De Tobacas*, 249 U. S. 425, 426; 63 L. Ed. 687, 688, an order of the Board was annulled by a judgment of the Philippine Supreme Court. The Board brought the judgment of the Court below to the Supreme Court for review. After the case was brought to the Supreme Court, the provision of

the law, under which the Board was acting and on which its order was based, was amended. The court states in this situation:

> "We are not called upon to consider the propriety of the judgment below, the proper course being, as is shown by many precedents, to reverse the judgment and remand the cause with a direction that it be dismissed without costs to either party. *United States v. The Peggy*, 1 Cranch 103, 2 L. Ed. 49; *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. Ed. 382, 16 Sup. Ct. Rep. 321, and 161 U. S. 101, 40 L. Ed. 632, 16 Sup. Ct. Rep. 492; *Dinsmore v. Southern Exp. Co.*, 183 U. S. 115, 46 L. Ed. 111, 22 Sup. Ct. Rep. 45; *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesselschaft*, 239 U. S. 466, 60 L. Ed. 387, 36 Sup. Ct. Rep. 212; *Berry v. Davis*, 242 U. S. 468, 61 L. Ed. 441, 37 Sup. Ct. Rep. 208.
>
> "Judgment reversed. Cause to be dismissed without costs to either party."

In *Duplex Printing Press Company vs. Deering*, 254 U. S. 443, 65 L. Ed. 349, 356, the right to injunctive relief of private suitors under the Sherman Anti Trust Act of 1880 was modified by the Clayton Act of 1914. With reference to suits which were pending at the time of the passage of the Clayton Act, the court states:

> "It (Clayton Act) was effective from the time of its passage, and applicable to pending suits for injunction. Obviously, this form of relief operates only in futuro, and the right to it must be determined as of the time of the hearing. *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 431, 432, 15 L. Ed. 435, 437, 438. See also *United States v. The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49, 51; *Sampeyreac v. United States*, 7 Pet. 222, 239, 240, 8 L. Ed. 665, 671, 672; *Mills v. Green*, 159 U. S. 651, 653, 40 L. Ed. 293, 294, 16 Sup. Ct. Rep. 132; *Dinsmore v. Southern Exp. Co.*, 183 U. S. 115, 120, 46 L. Ed. 111, 113, 22 Sup. Ct. Rep. 45; *Berry v. Davis*, 242 U. S. 468, 470, 61 L. Ed. 441, 442, 37 Sup. Ct. Rep. 208."

See also *Texas Company vs. Brown*, 258 U. S. 466, 473; 66 L. Ed. 721, 725, where the court states:

> "Although passed after the decree below, this act must be given effect in deciding the appeal, since the case involves only relief by injunction, and this operates wholly in futuro. *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 464, 65 L. Ed. 349, 355, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172."

In *American Steel Foundries vs. Tri-City Central Trades Council*, 257 U. S. 184, 201; 66 L. Ed. 189, 196, the court states:

> "The decree here appealed from in the district court had been entered before the Clayton Act passed. But the whole cause was taken up by the appeal. The complainant had no vested right in the decree of the district court while it was subject to review. *Rafferty v. Smith, B. & Co.*, this day announced (257 U. S. 226, post, 208, 42 Sup. Ct. Rep. 71). The circuit court of appeals was called upon to approve or to change the decree, and was obliged, therefore, to regard the new statute in its conclusion, and so are we."

See also *Ziffrin vs. United States*, 318 U. S. 73, 78; 87 L. Ed. 621, 625, in which the court stated:

> "A change in law between a nisi prius and an Apellate decision requires the Appellate Court to apply the changed law (citing cases)."

In *Interstate Hotel Company vs. Rennick Music Corp.*, 157 F 2d, 744, 748 (8th Circuit), the court said:

> "After the entry of the judgments in the District Court, but while the cases were pending in that court on motions for rehearing, the Nebraska statute relied on by appellant was repealed in its entirety. Revised Statutes Nebraska 1945, Cumulative Pocket Parts Supplement, sections 59-1401 to 59-1406. 'A change in the law between a nisi prius and an appellate decision requires the appellant court to apply the changed law.'

Ziffrin, Inc. vs. United States, 318 U. S. 73, 78, 63 S. Ct. 465, 469, 87 L. Ed. 621; *Carpenter v. Wabash Railway Co. et al*, 309 U. S. 23, 26, 27, 60 S. Ct. 416, 84 L. Ed. 454; *Texas Co. vs. Brown et al.*, 258 U. S. 466, 474, 42 S. Ct. 375, 66 L. Ed. 721; *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 541, 542; 61 S. Ct. 347, 85 L. Ed. 327; *Hines vs. Davidowitz*, 312 U. S. 52, 60, 61 S. Ct. 399, 85 L. Ed. 581; *Standard Oil Co. of Kansas et al. v. Angle et al.*, 5 Cir. 128 F. 2d 728, 730."

In the case of *Dinsmore v. Southern Express Company*, 183 U. S. 115, 120; 46 L. Ed. 111, 113, the petitioner applied for a writ of certiorari to the United States Circuit Court of Appeals for the 5th Circuit to review a decision reversing a decree of the Circuit Court for the Southern District of Georgia, which enjoined enforcement of an order of the Railroad Commission of Georgia requiring an express company to pay a war stamp tax.

After submission of the case to the Supreme Court, the act relating to the stamp tax was amended to distinctly exclude express companies. With respect to this situation, the court stated:

> "Although this cause was determined in the circuit court of appeals and was submitted here prior to July 1st, 1901, our judgment must have some reference to the act of 1901. In *United States v. The Peggy*, 1 Cranch, 103, 109; 2 L. Ed. 49, 50, the Chief Justice, delivering the opinion of the court said: 'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But, if subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.' *Mills vs. Green*, 159 U. S. 651, 653; 40 L. Ed. 293, 16 Sup. Ct. Rep. 132; *New Orleans Flour Inspector v. Glover*, 160 U. S. 170; 40 L. Ed.

382; 16 Sup. Ct. Rep. 321; 161 U. S. 101; 40 L. Ed. 632; 16 Sup. Ct. Rep. 492.

"If the cause had not been submitted in the circuit court of appeals until after the act of 1901 took effect, that court, we apprehend, would have dismissed the suit upon the ground that by the operation of that legislation the whole subject-matter of litigation had disappeared, and that the order of the railroad commission, even if originally valid, ceased to have any effect."

With respect to the petitioner, the decree entered against it on August 15, 1946, constitutes a continuing injunction.

McQuay Norris Mfg. Co. vs. N. L. R. B., 119 F 2d 1009; Cert. Den. 313 U. S. 565.

This decree orders the petitioner to perform certain acts which are in conflict with certain provisions of the Labor Management Relations Act, 1947, which became effective August 22, 1947.

Section 9 (f) of the act provides in substance that no complaint shall issue pursuant to a charge filed by a labor organization unless the organization shall file with the Secretary of Labor a copy of its constitution, by-laws and a report setting forth required information.

Section 9 (g) requires any national or international affiliate of this organization to so comply and section 9 (h) requires officers of this organization to file affidavits concerning nonmembership or affiliation with the communist party.

The Circuit Court of Appeals by its decree would deny the obligation of the Labor Management Relations Act, 1947, by ordering the petitioner to bargain with a labor organization that has not proven compliance with the new act with respect to the above sections, let alone entertain a petition or issue a complaint.

A decision by the Supreme Court concerning this situation is a question of importance to many in the clarification of the new act to avoid uncertainty in the administration of the new law. To give effect to the judgment below would seriously hinder the administration of the new law and deny its obligation.

In addition, the National Labor Relations Board, by its decision and an order dated April 25, 1946, found on the basis of checking application cards for membership that the League represented the pattern makers of the petitioner on January 16, 1945 (4). Over two and one-half years after the date of such a finding, the Circuit Court of Appeals gives effect to this finding in the face of undisputed testimony that the pattern makers did not desire to be represented by the League. Section 9 (c) of the Labor Management Relations Act, 1947, states that the determination of the question of representation shall be by secret ballot alone, and does not include any determination by card check or otherwise.

Section 103 of the Labor Management Relations Act, 1947, provides that the act shall not affect "any certification of representatives or any determination as to the appropriate collective bargaining unit * * * until one year after the date of such certification." By its opinion, the Circuit Court of Appeals states the League was designated as bargaining agent on January 16, 1945. Therefore, the provisions of the Labor Management Relations Act, 1947, are immediately applicable to the determination of this issue.

CONCLUSION

It is respectfully submitted that this case is a proper one for review by certiorari in this Court and that the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 236—October Term, 1946

(Argued May 8, 1947 Decided July 25, 1947)

Docket No. 20516

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONSOLIDATED MACHINE TOOL CORPORATION,
Respondent.

Before: Swan, Augustus N. Hand and Frank, Circuit Judges.

Petition to Enforce an Order of the National Labor Relations Board.

National Labor Relations Board seeks enforcement of its order requiring the respondent to cease and desist from certain unfair labor practices and to bargain collectively with Pattern Makers League of North America, A. F. of L.

Enforcement granted of the order as modified.

Gerhard P. Van Arkel, General Counsel, Morris P. Glushien, Associate General Counsel, A. Norman Somers, Assistant General Counsel, and Dominick L. Manoli, Joseph D. Greene and Reeves R. Hilton, Attorneys for Petitioner.

Percival D. Oviatt, Attorney for Respondent; George J. Skivington, of Counsel.

SWAN, Circuit Judge: This is a petition by the National Labor Relations Board for enforcement of its order of April 25, 1946 entered against Consolidated Machine Tool Corporation after a hearing before a trial examiner upon charges of unfair labor practices. The order is based upon findings that the respondent had engaged in certain unfair labor practices; it directs the respondent to cease therefrom and affirmatively requires it to bargain collectively, upon request, with Pattern Makers League of North America, affiliated with the American Federation of Labor, as the exclusive representative of its wood pattern makers at its plant in Rochester, N. Y., and to post appropriate notices. The respondent contends that the Board's findings are not supportable and its designation of the League as the bargaining representative is unjustified because the pattern makers had voluntarily withdrawn from the League before the hearing. On such issues the court's function is extremely limited; if the Board's findings are supported by substantial evidence they must be accepted.

In January 1945 the International Association of Machinists was seeking to become the collective bargaining representative of all the respondent's production and maintenance employees while the League was endeavoring to organize the wood pattern makers. On January 16th it was agreed between representatives of the Board, the respondent, the Association and the League that the pattern makers, of whom there were only ten, should constitute a separate unit for purposes of collective bargaining. By that date nine of the ten pattern makers had signed applications for membership in the League, and shortly thereafter Forman Maier was informed of that fact. Although signing the application did not make the applicant

a member of the League, since approval of the application and initiation of the candidate was requisite to membership, the Wagner Act requires no specific form of authorization to the bargaining agent and an application for union membership implies authority to bargain. *Lebanon Steel Foundry v. National Labor Relations Board*, 130 F 2d 404, 406 (C. A. D. C.), cert. den. 317 U. S. 659. Moreover, Lichtenwalter, district organizer for the League, testified that he had informed the applicants that signing the applications was a request on the League to act as their bargaining representative. Hence there was substantial evidence to support the Board's finding that on January 16, 1945 the League was the exclusive bargaining agent of the respondent's pattern makers. Nor can the finding be upset by the testimony that some of the signatures were conditional or were affixed in the belief that application for membership in the League was necessary to obtain exclusion from the unit which the Association hoped to represent. Lichtenwalter, who solicited the applications, denied that they were delivered conditionally, and the Board credited his testimony. Any issue of credibility must obviously be settled by the trial examiner who saw the witnesses.

Before the date of the hearing on September 6, 1945, all of the pattern makers had signed letters withdrawing their applications for membership in the League and expressing the wish not to be represented by it. Whether such withdrawal was voluntary or was induced by unfair labor practices of the employer was for the Board to find, and it found coercion. We cannot hold that there was no substantial evidence to support such finding. Foreman Maier requested the pattern makers to postpone their initiation into the League because of the Embrey incident. In making this request he stated that the management had accused him of having been the cause of the pattern makers' joining the League, thus communicating to them the company's opposition to the League. Shortly

thereafter, in April, Maier declared himself against the League by telling Simon that four of the pattern makers were against it, and expressing the opinion that, if it got in, the result would be that junior employees would receive the same wages as the seniors of whom Simon was one. In July 1945 Superintendent Hohnhorst called each of the pattern makers to his office, and, after discussing the charges filed by the League against the respondent, questioned him regarding his attitude toward the League and obtained his agreement to sign a letter withdrawing his application for membership and stating his desire not to be represented by the League. These incidents, in our opinion, sufficiently support the Board's conclusion that the respondent interfered with the employees' rights to self-organization, in violation of section 8 (1) of the Act, 29 USCA §158 (1).

The evidence also supports the finding as to the respondent's refusal to bargain with the League in violation of section 8 (5). Whether the refusal was motivated by a genuine doubt as to the League's designation by a majority of the pattern makers was for the Board to decide, and the coercive conduct previously discussed supports the Board's inference that the respondent's doubt was spurious. Also the choice of the remedy appropriate to expunge the effects of unfair labor practices is for the Board, not the courts. Consequently its affirmative order to bargain with the League was correct. *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702.

In one respect, however, we think the order was too broad. Paragraph 1 (b) should be limited by inserting the adjective "pattern-maker" before the word "employees", and a corresponding change made in the notice required to be posted. There was no evidence whatever of interference with employees other than those in the pattern-makers unit and no hostility to the Association's efforts to organize the other unit. The in-

junction should not go beyond the threatened danger. See *May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376, 392.

The order is modified as above indicated and enforcement granted of the order as so modified.

APPENDIX B

In the

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CONSOLIDATED MACHINE TOOL CORPORATION,
Respondent,

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decree Enforcing an Order of the National Labor Relations Board.

Before Swan, Augustus N. Hand and Frank, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its decision and order dated April 25, 1946. The Court on May 8, 1947, heard arguments of respective counsel and has considered the briefs of the parties. On July 28, 1947, the Court, being fully advised in the premises, handed down its decision enforc-

ing the said order, as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED, and DECREED that Consolidated Machine Tool Corporation, Rochester, New York, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Pattern Makers League of North America, affiliated with the American Federation of Labor, as the exclusive representative of all its wood pattern makers and apprentices at its plant in Rochester, New York, excluding production and maintenance employees, office and clerical employees, and all supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) Interrogating pattern maker employees concerning their membership in, or other activities on behalf of, the above-named or any other labor organization;

(c) In any manner interfering with the efforts of Pattern Makers League of North America, affiliated with the American Federation of Labor, to bargain collectively with it.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Pattern Makers League of North America, affiliated with the American Federation of Labor, as the exclusive representative of all its wood pattern makers and apprentices at its plant in Rochester, New York, excluding production and maintenance employees, office and clerical em-

ployees, and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post at its plant at Rochester, New York, copies of the notice attached hereto, marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Third Region, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Third Region in writing, within ten (10) days from the date of this Decree, what steps the respondent has taken to comply therewith.

(Signed) THOMAS W. SWAN
Judge, United States Circuit Court of Appeals for the Second Circuit

(Signed) AUGUSTUS N. HAND
Judge, United States Circuit Court of Appeals for the Second Circuit

(Signed) JEROME N. FRANK
Judge, United States Circuit Court of Appeals for the Second Circuit

Filed: August 15, 1947

APPENDIX A

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, as enforced by a decree of the United States Circuit Court of Appeals for the Second Circuit, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not in any manner interfere with the efforts of Pattern Makers League of North America, affiliated with the American Federation of Labor, to bargain collectively with us.

We will not interrogate our pattern maker employees concerning their membership in, or other activities on behalf of the above-named or any other labor organization.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is: All wood pattern makers and apprentices employed at the Rochester, New York, Plant, excluding production and maintenance employees, office and clerical employees, and all supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

CONSOLIDATED MACHINE TOOL CORPORATION
(Employer)

By .....
(Representative) *(Title)*

Dated .....

.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C

"Labor Management Relations Act, 1947—

Section 9 (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section (a 9);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 9 (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitu-

tion and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the proceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefore; and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor."

Section 9 (g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

Section 9 (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

Section 103.—No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the

effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs."